86-952

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

DANIEL L. FIERRO,

Petitioner,

v.

OTIS R. BOWEN,
Secretary of Department
of Health and Human Services,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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COUNSEL OF RECORD FOR
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70 pp

QUESTION PRESENTED

Whether the Social Security Administration is bound by its own regulation specifying the conditions under which own-motion review of an Administrative Law Judge's decision will be initiated.

LIST OF ALL PARTIES

DANIEL F. FELDO

MARGARET M. HECKLER

OTIS R. BOWEN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

No._____

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the proceeding on August 21, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as 798 F.2d 1351 (10th Cir. 1986).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion and judgment on August 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND ADMINISTRATIVE REGULATIONS

42 U.S.C. Section 405(g):
"Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtin a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision

or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides. ...The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

20 C.F.R Section 404.969:

"Appeals Council initiates review.

Anytime within 60 days after the date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken. If the Appeals Council does review the hearing decision or dismissal, notice of the action will be mailed to all parties at their last known address."

20 C.F.R. Section 404.970:
"Cases the Appeals Council will review.

(a) The Appeals Council will review a case if

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest."

STATEMENT OF THE CASE

1. Course of the proceedings

The basis for federal jurisdiction here was Section 205(g) of the Social Security Act, 42 U.S.C. Section 405(g), pusuant to which Petitioner initited an action for judicial review of a final decision of the Secretary of the U.S. Department of Health and Human Services denying his claim for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C. Section 416(i) and 423, and for Supplemental Security Income

benefits under Title XVI of the Act, 42 U.S.C. <1381a.

In October 1980, the Plaintiff filed an application for Disability Insurance Benefits (Tr. 52-55), and an application for Supplemental Security Income benefits (Tr. i, 1). On January 19, 1982, the Administrative Law Judge sitting in this case issued a decision wholly favorable to this claimant on both applications, approving the same. (Supplemental Tr. 153-54). The Appeals Council of the Social Security Administration, sua sponte, on March 12, 1982, vacated the Administrative Law Judge's decision, because "...the Council believed that a psychiatric evaluation with psychological testing was necessary in order to clarify the severity, if any, of (the claimant's) impairment." (Tr.18.)

Following claimant's supplemental hearing of September 21, 1982, the Administrative Law Judge, on November 8, 1982, issued his "Decision Upon Remand by Appeals Council," again finding the Plaintiff disabled and entitled to Social Security benefits under both applications. (Tr. 17-24.) On January 6, 1983, the Appeals Council, on its own motion, dedided to review the favorable hearing decision of the Administrative Law Judge. (Tr. 147-48.) On April 14, 1983, the Appeals Council reversed the Administrative Law Judge and issued its own decision denying the Plaintiff's applications for Social Security benefits. (Tr. 4-14)

The Plaintiff timely appealed from the adverse administrative decision of the Defendant Secretary to the United States District Court of New Mexico. On September

16, 1985 the District Court Judge sitting on this matter entered an Order affirming the administrative decision of the Defendant Secretary and dismissing the Plaintiff's complaint. Thereafter on November 7, 1985, Plaintiff timely appealed in the instant cause to the United States Court of Appeals for the Tenth Circuit, which has here upheld the action of the Social Security Appeals Council in reviewing and reversing the favorable Administrative Law Judge's decision.

REASONS FOR GRANTING THE WRIT

1. The Circuits are in conflict on this issue.

There is a division of authority between, and even within, the Circuit Courts of Appeals on the issue of whether the Social Secuirty regulations promulgated

as 20 C.F.R. Section 404.970(a) limit, to any degree, the power of Appeals Council to review the considered decision of an Administrative Law Judge upon conclusion of the administrative hearing.

Cases purporting to answer the proposition affirmateively are represented by the following: Parris v. Heckler, 733 F.2d 324 (4th Cir. 1984); Newsome v. Secretary of Health and Human Services, 753 F.2d 44 (6th Cir.1985); Shepard v. Secretary, 758 F.2d 196 (6th Cir. 1985) Scott v. Heckler, 768 F.2d 172 (7th Cir. 1985); Ward v. Heckler, 622 F. Supp. 462 (D.C. Ill. 1985); Ellis v. Heckler, 621 F.Supp. 823 (D.C.Ill. 1985); W.C. v. Heckler, 629 F. Supp. 791 (W.D. Wash. 1985).

Cases appearing to answer the same proposition negatively are represented by

the following: Lopez-Cardona v. Secretary, 747 F.2d 1081 (1st Cir. 1984); Kellough v. Heckler, 785 F.2d 1147 (4th Cir. 1986), Gross v. Heckler, 785 F.2d 1163 (4th Cir. 1986) (J. Hall dissenting); Deters v. Secretary, 789 F.2d 1181 (5th Cir. 1986) DeLong v. Heckler, 771 F.2d 266 (7th Cir. 1985); Baker v. Heckler, 730 F.2d 1147 (8th Cir. 1984); Taylor v. Heckler, 765 F.2d 872 (9th Cir. 1985); Parker v. Bowen, 788 F.2d 1147 (11th Cir. 1986).

A possible related petition for certiorari appears to be pending before the Court, in Escalante v. Bowen, No. 85-1726.

Such recurring conflict among the respective federal courts in the interpretation of federal Social Security law should be resolved definitively by the Supreme Court.

2. Under the Social Security regulations, it was improper as a matter of law for the Appeals Council to decide to review and reverse this case, where the Administrative Law Judges' decision in favor of the claimant was supported by substantial evidence.

Upon an initial remand from the Appeals Council, the Administrative Law Judge conducted a live, face-to-face administrative hearing at which the Plaintiff testified and could be observed and evaluated for veracity and symptomology by the trier-of-fact. (Tr. 40-50.) Based upon that hearing and all the other evidence of record, the Administrative Law Judge issued a decision in favor of the Plaintiff. (Tr. 17-24.) The Appeals Council, at a remote place and time, and upon its own motion, proceeded to review that hearing decision, on the purported ground that such decision was "not supported by substantial evidence ...

pursuant to regulation 404.970(a)(3)". (Tr. 148.) Subsequently, the Appeals Council issued its own decision, reversing the hearing decision of the Administrative Law Judge, and denying the Plaintiff Supplemental Security Income and Disability Insurance Benefits. (Tr. 14.)

Social Security regulations, found at 20 C.F.R. <404.970(a), specify the cases which will be reviewed by the Appeals Council as follows:

> "(1) There appears to be an abuse of discretion by the administrative law judge;
>
> (2) There is an error of law;
>
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
>
> (4) There is a broad policy or

procedural issue that may affect the general public interest."

The words of the applicable regulations seem clear, and purposeful. The Appeals Council will -- and should -- review any Administrative Law Judge's decision which falls into one of the categories of 20 C.F.R. Section 404.970(a): (1) abuse of discretion; (2) error of law; (3) not supproted by substantial evidence; or, (4) affecting the general public interest. And under 20 C.F.R. Section 404.969, if the Appeals Council seeks such an own-motion review, it is to do so within 60 days. There is nothing tortured about such a construction of the regulations.

However, the Secretary has argued, and a number of the Courts have decided, that the former regulation merely states when

the Appeals Council "shall" review, while the latter regualtion says The Appeals Council "may" review any ALJ decision for any reason, without limit, other than time. The net effect of such an interpretation is to nullify the former regulation: If the Appeals Council "may" review ALJ decisions unfettered, then the regulation delineating four circumstances prompting such review is superfluous and utterly meaningless.

What's more, such an interpretation suggesting unbridled authority creates the danger that actual arbitrariness on the part of the Appeals Council will be permitted in initiating such review, at a place and time far removed from the claimant's administrative hearing before the ALJ. It truly seems difficult to concieve of situations not covered by 20 C.F.R. Section 404.970(a), where the

Appeals Council should properly, and could legitimately, substitute its opinion for that of the ALJ. While the Social Security administrative proceedings are but a quasi-judicial system of justice, tney should still nominally serve the cause of justice -- and arbitrariness manifestly does not. To render 20 C.F.R. Section 404.970(a) a legal nullity does not serve ends of justice. While it may seem expedient to do so, it is not just. Petitioner submits that the regulaory language should be given its plain and ordinary meaning. To do otherwise is to engage in the linguistic contortions of which bureaucracies are so capable, and which lamentably are nothing new to history, or our literature:

> "`When I use a word`, Humpty Dumpty said, in rather a scornful tone, `it means just what I choose it to mean--

neither more nor less`.

`The question is`, said Alice, `whether you <u>can</u> make words mean so many different things`.

`The question is`, said Humpty Dumpty, `which is to be master--that`s all`."

Lewis Carroll, <u>Through the Looking Glass</u> (Heritage Press, New York, 1941), p.112.

Petitioner argues that the Appeals Council failed to follow the Defendant Secretary`s own regulations and applied an improper standard of review here, since the decision of the Administrative Law Judge is supported by substantial evidence. Such "Substantial evidence" was defined in <u>Parris v. Heckler</u>, 733 F.2d 324, 326 (4th Cir. 1984):

> "...(T)he Appeals Council informed the claimant, in a communication

which is part of the record in this case, that `(t)he administrative law judge's ultimate conclusion as to `disability` is not supported by substantial evidence.` ...This ("substantial evidence") standard has been defined as `such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,` Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938), for purposes of our review of the Secretary, and there is no reason to suppose that the Secretary's regulations were

drafted with a different meaning in mind."

The Administrative Law Judge, in his favorable decision of November 8, 1982, expressly found that this claimant is entitled to Social Security Benefits because, "Based on the evidence of record, supported clinically and by x-ray evidence, claimant is disabled permanently and unable to do any substantial gainful activity, even sedentary-type work because of his inability to sit and stand alternately for a period in excess of three hours and this would preclude sedentary-type work." (Tr. 23.) The Administrative Law Judge found that the Plaintiff had the following impairments: "Claimant has an acute and chronic form of cervical strain and acute and chronic osteoarthritis with degenerative problems

involving the cervical spine and other problems. Claimant also has a psychogenic pain syndrome." (Tr. 23.)

The Administrative Law Judge's evaluation of the evidence in his decision is telling, and demonstrates that his decision is supported by substantial evidence:

> "Claimant alleged disability beginning August 30, 1980, because of a neck injury and residuals of an old injury to this left arm. ... He is having problems in the form of musculoskeletal type headaches and complains of neck pain. He is still taking medications for muscle spasms and pain. In his October 15, 1980 report, Dr. Rodriguez noted that

claimant had a permanent disability which he would have to deal with for the rest of his life, that he would need further hospitalizations, and that his incapacity is on a permanent and chronic basis. ... The medical evidence submitted at the supplemental hearing, and the claimant's testimony, corroborates that claimantcan not do any work. Claimant was wearing a collar at the hearing, carrying a cane, stating that he has had these problems since an automobile accident in 1980, that he has a cervical disc, that his neck hurts, being aggravated by the automobile accident. He cannot

sit or stand very long. His hip had been scraped at the Veteran's Administration, and his left forearm has a metal plate and he can't lift anything heavy. ... Dr. Rodriguez is his treating doctor. He has trouble bending over and he gets dizzy or has blackouts when he does. He can't turn his neck without pain and had to give up bowling and baseball. He couldn't stand for eight hours, couldn't bend over to cut hair, he can't support the weight of his body without pain. ... He can stand an hour or two without the cane and can sit 30 minutes to an hour before he has to stretch and get up and walk around. He could sit or stand alternately for maybe

three hours. Kneeling aggravates his back, especially when he gets up. He has radiation down both arms and his left hand has been affected. ... X-rays taken on March 30, 1982, indicate degenerative osteophytic and cystic changes present in the interspaces L4-5 and L5-S1 and also a bridging osteophyte seen laterally on the right at L1 and L2 interspace. The moderate degenerative cystic changes were seen in all the disc spaces and the degenerative osteophytic changes were seen extending anteriorly at L4 and laterally at all interspaces. Dr. Rodriguez ... reiterates this in Exhibit No. 30 and he has the diagnosis, after

testing, of an acute and chronic form of cervical strain, also acute and chronic osteoarthritis with degenerative problems along the cervical spine and other bones in the claimant's body. His condition is gradually deteriorating and advancing. He sets out claimant's treatment and his medication." (Emphasis added.) (Tr. 21-22.)

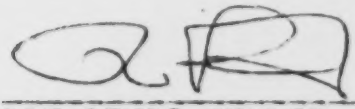
There is certainly substantial evidence from the testimony and medical Exhibits of record to sustain the findings of the Administrative Law Judge, and the Appeals Council's review and reversal of that decision are improper under the Defendant's own regulations, 20 C.F.R. <404.970(a)(3).

If there was substantial evidence for the Administrative Law Judge's determination of disability, then the reviewing Courts should have reversed the Appeals Council's denial of benefits, according to Newsome v. Secretary of Health and Human Services, 753 F.2d 44 (6th Cir. 1985), and its progency. "To rule otherwise would be to render the hearing before the ALJ essentially without effect, subject to the unbridled de novo review of the Appeals Council." Scott v. Heckler, 768 F.2d 172, 178 (7th Cir. 1985). In this case, the Appeals Council had no authority to review the decision of the Administrative Law Judge, contrary to the decision of the Tenth Circuit here.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-2730

DANIEL L. FIERRO,

Plaintiff-Appellant,

v.

OTIS R. BOWEN, M.D., Secretary, Department of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
For the District of New Mexico
(D.C. No. CV-83-0709JB)

Ray Lewis Fuller of Southern New Mexico Legal Services, Inc., Las Cruces, New Mexico , for Plaintiff-Appellant.

Karen J. Behner, Assistant Regional Counsel (Edwin L. Meese, United States Attorney General, Washington, D.C.; William L. Lutz, United States Attorney, District of New Mexico; Gayla Fuller, Chief Counsel, Region VI; Patrick A. Hudson, Principal Regional Counsel, Social Security Disability, Litigation Branch; with her on the brief), Dallas, Texas, for Defendant-Appellee.

Before McKay, TACHA, and McWilliams, Circuit Judges.

McWILLIAMS, Circuit Judge.

Daniel L. Fierro appeals from an order and judgment of the United States District Court for the District of New Mexico which affirmed a final decision of the Secretary of the Department of Health and Human Services. The Secretary's decision had denied Fierro's application for disability insurance benefits and supplemental security income benefits. On appeal, Fierro raises two matters (1) The Appeals Council had no power of authority to review the two decisions of the Administrative Law Judge, each of which found for Fierro and granted him benefits, and, alternatively (2) the ultimate decision of the appeals Council, which became the decision of the Secretary, is not supported by the record. We are not persuaded by either argument and therefore affirm.

Fierro made application for disability benefits and supplemental security income benefits based on a neck injury sustained in an automobile accident and a residual disability from an old injury to the left arm. Fierro had been a barber for some 27 years. Fierro's application was administratively denied by both state and federal agencies. Fierro then asked for a de novo hearing before an administrative law judge (ALJ). The latter, after hearing, rendered a decision in favor of Fierro and granted him the benefits sought. Thereafter, the Appeals Council vacated the ALJ's decision, and remanded the case to the ALJ with direction that there be a pshychiatric evaluation and psychological testing followed by further hearings on the case. On rehearing, at which time Fierro and his

attorney appeared, the ALJ, after taking additional testimony, again found for Fierro and granted him the requested benefits. The Appeals Council thereafter reviewed the ALJ's second decision in the matter and then issued its own decision that Fierro was not disabled within the meaning of the Social Security Act and, accordingly, denied the application. The decision of the Appeals Board became the final decision of the Secretary from which Fierro sought judicial review.[1]

We must first decide whether we are going to initially review the decision of the ALJ and determine whether it is

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[1] The Social Security Act provides that federal courts may review the "final decision" of the Secretary. 42 U.S.C. Section 405(g). Pursuant to the Secretary's rulemaking authority under 42 U.S.C. Section 405(a), the Appeals Council has become the final decision-making body. See 20 C.F.R. Section 404.900 (1985).

supported by substantial evidence, or, by-pass the ALJ's decison and proceed to a consideration of whether the Secretary's decison is supported by substantial evidence.[2] In this regard, Fierro, the appellant, argues that under 20 C.F.R. Section 404.970(a) the Appeals Council may only review a decision of an ALJ if it finds that one the four conditions specified in the regulation exists.[3] In

[2] In our view, we are only concerned with the ALJ'S second decison, which was rejected by the Appeals Council. The ALJ's first decision was merely vacated, and the case remanded for further hearing, which was in fact held.

[3] 20 C.F.R. Section 404.970(a) provides:

> The Appeals Council will review a case if-
> (1) There appears to be an abuse ofdiscretionbythe administrative law judge;
> (2) There is an error of law;
> (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or

the instant case, says Fierro, the Appeal Council indicated that it was reviewing the ALJ's decision because of a belief that the ALJ's action, findings, or conclusions were not supported by substantial evidence, and that, such being the case, a review of the ALJ's decision to determine whether it is, in fact, supported by substantial evidence is necessary in order to first determine whether the Appeals Council had any power or authority to review the ALJ's decision. In thus arguing, Fierro relies on Scott v. Heckler, 768 F.2d 172 (7th Cir. 1985); Shepherd v. Secretary, 758 F.2d 196 (6th Cir. 1985); and Parker v. Heckler, 763 F.2d 1363 (11th Cir. 1985).[4]

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(4) There is a broad policy or procedural issue that may affect the general public interest.

[4] We are advised that petitions for

rehearing en banc were granted in both Shepherd and Parker. As of the date of this opinion, Shepherd has not been decided by the en banc court, but Parker has been decided and appears at 788 F.2d 1512 (11th Cir. 1986). The Eleventh Circuit held en banc that where "the Appeals Council reverses an ALJ's decision on its own motion, judicial review is limited to determining whether the Appeals Council's decision is supported by substantial evidence." 788 F.2d at 1519-20.

In Scott, the Seventh Circuit held the Secretary to its choice to exercise review of the ALJ's decision under 20 C.F.R. Section 404.970(a) and therefore determined that it had to decide as a threshold matter whether the Secretary's decision to conduct "own-motion" review based on the condition that the ALJ award was not supported by substantial evidence was correct. 768 F.2d at 179. In a later case, Delong v. Heckler,, 771 F.2d 266 (7th Cir. 1985), however, the Seventh Circuit recognized the broad power fo the Secretary in making "own-motion" review under Section 404.969. See our note 5 infra. The claimant in DeLong had sought review under another section, and the Seventh Circuit held that the Appeals Council's review and subsequent reversal of the ALJ's award of short-term benefits was proper even though the Council had not sought review itself. "If the Appeals Council has, as it unquestionably does, the power to review a grant of benefits on its own initiative, it must have that

The Secretary argues that the Secretary, who, under the statutory scheme, has delegated his authority in this regard to the Appeals Council, makes, in a given case, the "final and reviewable decision," and not the ALJ, citing, inter alia, Weinberger v. Salfi, 422 U.S. 749, 766 (1975). Further, the Secretary argues that the provisions of 20 C.F.R. Section 404.970 (a) spell out when the Appeals Council will review an ALJ decision, but that such does not cut back on the provisions of 20 C.F.R. Section 404.969, which grants broad authority to the Appeals Council, under certain time limitations, to review any action of an ALJ.[5] In support of its position, the

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power in an appeal initiated by the claimant himself." 771 F.2d at 268.

[5] Section 404.969 provides in pertinent

Secretary relies on such cases as Kellough v. Heckler, 785 F.2d 1147 (4th Cir. 1986); Howard v. Heckler, 782 F.2d 1484 (9th Cir. 1986); Taylor v. Heckler, 765 F.2d 872, 875 (9th Cir. 1985); Lopez-Cardona v. Secretary 747 F.2d 1081 (1st Cir. 1984); Baker v. Heckler, 730 F.2d 1147 (8th Cir. 1984); and Beavers v. Secretary, 577 F.2d 383, 386 (6th Cir. 1978). The Secretary's interpretation of its regulations is reasonable in terms of the words of the regulation and the purposes of the statute and is therefore entitled to great deference. E.I. DuPont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977); Baker v. Heckler, 730 F.2d 1147 1149 (1984).

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part: Anytime within 60 days after date of a hearing decision or dismissal, the Appeals Council itself may decide to review the action that was taken.

We believe the Secretary's position on this procedural matter is the preferable and correct one, and is supported by the weight of authority.[6] To hold that our task is to review the ALJ's decision and decide whether it is supported by substantial evidence, and ignore the Secretary's decision, is, in a sense, allowing the tail to wag the dog. A hearing before an ALJ is an intermediate step, albeit an important one, in the

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[6] In addition to cases cited in text, see Deters v. Secretary, 789 F.2d 1181 (5th Cir. 1986); Lovejoy v. Heckler, 790 F.2d 1114 (4th Cir. 1986); and Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986). In White v. Schweiker, 725 F.2d 91, 93-94 (10th Cir. 1984), in a factual situation different from that of the instant case, this court recognized the Appeals Council's full power to substitute its judgment for that of the ALJ, citing, inter alia, Beavers v. Secretary, 577 F.2d 383 (6th Cir. 1978).

overall scheme set up by statute and implementing regulations for the disposition of applications for disability benefits. The Social Security Administration has hundreds of administrative law judges deciding in the aggregate hundreds of thousands of disability cases a year. Review of ALJ decisions under Section 404.969 is a means to achieve critically needed consistency. DeLong v. Heckler, 771 F.2d 266, 268 (7th Cir. 1985).

In view of its overriding power to review any decision of an ALJ, the fact that the Appeals Council initially assigned as its reason for review 20 C.F.R. Section 404.970 (a) (3) does not mean that we first examine the ALJ's decision and determine whether it is supported by substantial evidence. See,

in this regard, Lopez-Cardona, 747 F.2d at 1083, where the First Circuit, after noting that the Appeals Council had initially referred to 20 C.F.R. Section 404.970 (a)(3), i.e., lack of substantial evidence, as grounds for reviewing the ALJ's decision, went on to state that even though it might later develop, on actual review, that the ALJ's decision was supported by substantial evidence, the "Appeals Council did not violate its regulations by initiating review." In this same connection, see also Baker v. Heckler, 730 F.2d at 1150, where the Eighth Circuit commented as follows:

> Secondly, Baker's argument overlooks the fact that the decision by the Appeals Council to single out a given case for own-motion review necessarily occurs at the beginning of the Appeals Council process. The Council may believe for example, that the case fits one of the four categories listed in

> the regulations, but it may turn out, after full examination, the at this initial impression was mistaken. We do not believe that the Council is then required to abandon its own review and to allow the ALJ's decision to stand, even when it has a definite and firm conviction that the ALJ was mistaken. The question of power to review must, as a practical matter, be addressed and decided at a preliminary state, not after the review is completed, at a time when a negative answer to the question would render the whole review process nugatory.

(Emphasis added). See also Razey v. Heckler, 785 F.2d 1426, 1428-29 (9th Cir. 1986).

Being of the firm view that the task of the judiciary in a situation of the present sort is to review the decision of the Secretary, and not that of the ALJ, we proceed to consider whether the findings of the Secretary are supported by substantial evidence, which, if they are, is, of course, conclusive on the matter.

42 U.S.C. Section 405(g). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Teter v. Heckler, 775 F.2d 1104, 1105 (10th Cir. 1985). However, where the Secretary, acting through the Appeals Council, overturns a decision of the ALJ granting benefits, and, in so doing, differs with the ALJ's assessment of witness credibility, the Secretary should fully articulate his reasons for so doing, and then, with heightened scrutiny, we must decide whether such reasons find support in the record. Webber v. Secretary, 784 F.2d 293, (8th Cir. 1986); Howard v. Heckler, 782 F. 2d at 1487; Lopez-Cardona, 747 F.2d at 1084.

Our study of the administrative record leads us to conclude that the Secretary fully articulated his reasons for reversing the ALJ and that such are supported by the record. Fierro's claim of disability is based on his own testimony and the testimony of his personal physician, the latter testifying that Fierro was totally and permanently disabled. Fierro's subjective complaint of pain is by itself insufficient to establish disability. See 42 U.S.C. Section 423 (d) (5) (a); 20 C.F.R. Section 404.1529; Taylor v. Heckler, 765 f.2d 872, 876 (9th Cir. 1985). In rejecting the testimony of Fierro's doctor, the Appeals Council, in a commendably detailed explanation, noted, inter alia, that clinical testing simply did not corroborate the doctor's opinion of total

and permanent disability and that testimony of an orthopedic surgeon, a neurologist, a clinical psychologist, and a psychiatrist, each of whom personally examined Fierro, was, essentially, at odds with the testimony of Fierro and his doctor. The combined testimony of these other doctors supports the conclusion that Fierro was not capable of "at least light level work activity," which includes barbering. In this regard, and by way of example only, the clinical psychologist testified that if Fierro is compensated for his claimed disability, it will become a "way of life."

Judgment affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 83-709-JB

DANIEL L. FIERRO,	) Filed
	) AT
Plaintiff,	) ALBUQUERQUE
	)
v.	) SEP 18, 1985
	)
MARGARET M. HECKLER, Secretary, Department of Health and Human Services,	)
	)
Defendant.	)

MEMORANDUM OPINION

This is an action pursuant to 42 U.S.C. Section 405(g) to review the final decision of the Secretary of Health and Human Services that plaintiff is not entitled to disability benefits under Title II of the Social Security Act, 42 U.S.C. Section 416(i) and 423, and supplemental security income benefits based on disability under Title XVI of the

act, 42 U.S.C. Section 1381a.[1] Defendant filed a Motion to Affirm Administrative Agency Decision with supporting memorandum. Plaintiff filed an opposing memorandum.

Plaintiff applied for disability benefits on October 6, 1980 alleging he became disabled on August 30, 1980 because of a neck injury and an injury to his left arm. Plaintiff's application was denied both initially and upon reconsideration at the administrative level. Plaintiff requested a de novo hearing before an Administrative Law Judge (ALJ). A hearing was held, and on January 19, 1982 the ALJ

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[1]All citations to regulations will be to the regulations for disability determinations under Title II. Supplemental security income regulations tract the language of the disability regulations verbatim, so the parallel citations will not be given.

rendered a decision finding Plaintiff to be disabled. (R. 153-54.) This decision was apparently[2] rejected by the Appeals Council, and the case was remanded to the ALJ for further consideration. A second hearing was held, and the ALJ again issued a favorable decision. (R. 18-24). On April 14, 1983 the Appeals Council reviewed the decision on its own motion, see 20 C.F.R. Section 404.969 (1984) and reversed the ALJ's decision. Plaintiff then filed this action seeking judicial review of the Secretary's decision.

Plaintiff's first allegation of error is that the record before the Court is incomplete, which precluded adequate judicial review. The following documents

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[2]The Appeals Council's rejection of that decision is not in the record before this ECourt. (R. 1-2.)

are not inlcuded in the record on appeal: Plaintiff's application for Supplemental Security Income, the first notice to Plaintiff denying disability benefits, two preliminary disability determinations and the Appeals Council's remand order dated March 12, 1982. (R.O., 1.) Plaintiff contends that the record is inadequate to determine whether the administrative proceedings were conducted in accordance with the applicable regulations, and cites Bailey v. Heckler, 576 F.Supp. 621 (D. D.C. 1984) as support for this proposition. In Bailey the district court found that judicial review was impossible because the record was incomplete regarding a determinative fact, Plaintiff's educational level. The portion of the hearing transcript where the claimant discussed his ability to read

and write were inaudible. Id. at 622#623. That is not the case in the action before this Court. The complete hearing transcript and all of the medical evidence are in the record. Although several administrative documents are not in the record, these are not necessary to the Court's review. Perhaps the most important document not included in the record is the Appeals Council's remand order, but even that is not necessary, because the Court has before it the Appeals Council's final decision, and the ALJ's decision which was reviewed by the Appeals Council. Although the Court does not condone the Secretary's loss of these documents, in this instance a review on the merits if not precluded.

The medical evidence can be summarized as follows. Plaintiff's

treating physician, Dr. Rodriguez, first treated Plaintiff in February 1980. Plaintiff was admitted to a hospital in September 1980 for back pain, cervical strain and migraine headaches. An examination by Dr. Rodriguez revealed tenderness and pain in Plaintiff's neck and spine. (R. 81-81). A lumbar spine series revealed degenerative disc narrowing between L4-5 and L5-S1, an old avulsion fracture at L4, and mild to moderate spondylosis[3] of the lumbar spine. (R. 86.) Plaintiff was treated conservatively and did very well.

In October 1980, Dr. Rodriguez reported that Plaintiff's condition was the same, with continued neck and lower

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[3]Degenerative joint disease affecting the lumber vertebrae and disks, causing pain and stiffness. Doralnd's Medical Dictionary at 1239 (26th ed. 1981)

spine pain, stress ulcer syndrome, gastroduodenitis, acute anxiety reaction and depression. (R. 91-92.)

Plaintiff was admitted to the hospital in April 1981 for migraine headaches and breast pain. He was treated conservatively with good results. (R. 98) While Plaintiff was hospitalized, a consultative examination was performed by Dr. Bieganowski. Plaintiff had a full range of neck motion without pain, although there was tenderness in the area. A motor examination was normal, with full strength in all muscle groups. Based on these findings Dr. Bieganowski diagnosed cervical myositis[4] and recommended electromyograms and nerve conduction

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[4] Inflammation of a voluntary muscle. Dorland's Medical Dictionary at 863 (26th ed. 1981).

studies of the neck. He noted that Plaintiff had little intention of returning to work, except possibly part-time, and Plaintiff's illness was therefore thought to be difficult to treat. (R. 101-103.) The day after Dr. Bieganowski's consultation, the recommended electrodiagnostic study of Plaintiff's upper extremities, shoulder girdles and neck was performed, and the results were normal, (R. 118), as were motor nerve conduction studies. (R.119-20.)

In June 1981, Dr. Rodriguez stated that Plaintiff's medical problems had not improved, that he had local neck pain and joint pain, but that there were "no definite stiff joints or deformed joints to any degree." Dr. Rodriguez stated that Plaintiff is totally and permanently disabled. (R. 96.)

Plaintiff was hospitalized once again in April 1982, complaining of neck and lower back pain, with numbness in his arms and legs. Plaintiff was found to have cervical strain and osteoarthritis. He was given medications and physical therapy and released after improvement. (R. 121, 132.)

In January 1983 Dr. Rodriguez reported that Plaintiff has a great deal of pain and muscle spasm upon flexion and extension of his trunk. Dr. Rodriguez stated that he believes Plaintiff has a serious illness even though the EMG and X-rays results have been negative. (R. 149.)

Plaintiff was examined by Dr. Boggiano, an orthopedic surgeon, in December 1980. Dr. Boggiano stated that in answering questions about all of the systems of his body, Plaintiff had

complaints of problems with every system. Dr. Boggiano's examination revealed that Plaintiff was not in pain, and that although he wore a cervical collar to the office, he didn't need it. Dr. Boggiano stated that when Plaintiff undressed and dressed himself, he moved his spine perfectly with no signs of pain or weakness. Plaintiff had an excellent and asymtomatic range of motion of the cervical dorsolumbar spine. There was no tenderness over the spinous processes, and no paravetebral muscle spasm. Plaintiff had full range of motion of all of the joints of his upper body. There were no signs of atrophy, his grips were strong, and the motor, sensory and reflex tests were all normal. Upon examination of the lower extremities Dr. Boggiano noted a

slight genu valgus.[5] Plaintiff walked with a normal step, could squat and could perform the straight legs raising test. There were no signs of atrophy. X#rays of the cervical spine showed spondylophytes on the anterior borders of the lower cervical vertebrae, which Dr. Boggiano feels is "a very common condition at this age." (R. 89.) The intervertebral discs, facets, pedicles and vetebral bodies were all within normal limits. Dr. Boggiano diagnosed multiple symptoms of functional[6] origin, and an asymptomatic cervical and lumbar spine which radiologically exhibits spondylophytes. Dr. Boggiano concluded that Plaintiff could perform a manual type

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[5]Knock#knee. Dorland`s Medical Dictionary at 547 (26th ed. 1981).

[6]Said of disburbaces of function with no detectable organic cause. Id. at 531.

of work for eight hours a day, including his past relevant work as a barber. Dr. Boggiano strongly recommended that Plaintiff be seen by a psychiatrist. (R. 88-89.) Plaintiff was evaluated by a psychologist and a psychiatrist in April 1982. Dr. Curtis, a clinical psychologist, noted that Plaintiff did not appear depressed or anxious, although his affect was quite flat generally. Plaintiff's concentration was poor, his abstract thinking was impaired, and he had a generalized perceptual deficit. Dr. Curtis noted that none of these deficits are significant handicaps for working. Regarding Plaintiff's complaints of pain Dr. Curtis stated the following:

> However, the Rorschach is essentially normal, and we certainly cannot confirm the presence of any type of mental process disorder in thinking. He is fairly open

> on his Rorschach, and this is unusual for a man with as many somatic complaints as he has. This Rorschack really raises the question of ## Are all of these complaints based upon real pain or it there some exaggeration or malingering?
>
> Certainly, I can say with pretty sound evidence that he is not disabled by any major psychological disorder.

Dr. Curtis went on to say that if Plaintiff is not compensated, his pain will become a way of life for him. Plaintiff was thought to be capable of doing any number of jobs. Dr. Curtis' final diagnosis was psychogenic[7] pain disorder. (R. 125#27.)

Dr. McCann, a psychiatrist, also examined Plaintiff in April 1982. Dr.

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[7]Having an emotional or psychologic origin, as opposed to an organic basis. Dorland's Medical Dictionary at 1091 (26th ed. 1981).

McCann noted that Plaintiff wore a neck collar during the interview and appeared to be in a mild degree of discomfort. There appeared to be a mild restriction of Plaintiff's daily activities. There was no evidence of psychotic depression or a basic thinking disorder. Dr. McCann concluded that Plaintiff's psychiatric examination was within normal limits.

Plaintiff testified at the hearing that he can't move his body suddenly without dizziness and nausea and that he has lower back and neck pain. He can't sit or stand for long periods and he can't lift heavy objects. (R. 45#49.)

The limited function of this Court on judicial review under 42 U.S.C. Section 405(g) is to determine whether there is substantial evidence in the record, taken as a whole, to support the findings and

decisions of the Secretary. Hedge v. Richardson, 458 F.2d 1065 (10th Cir. 1972). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. Richardson v. Perales, 402 U.S. 389 (1971). Substantial evidence is more than a scintialla and is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. Id.

The burden is on Plaintiff to prove his disability by establishing an impairment which lasts at least twelve months and prevents him from engaging in substantial gainful activity. 20 C.F.R. Section 404.1505 (1984); Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). However, once a claimant shows he is not able to perform his past relevant work, the burden shifts to the Secretary to show

the claimant has the residual ability to do some other types of work. Kelback v. Harris, 634 F.2d 1304 (10th Cir. 1980).

The Secretary's conclusion that Plaintiff is not disabled is based on the finding that Plaintiff can perform his past relevant work as a barber, which requires continuous standing and minimal lifting. (R. 13, 67.) Therefore, contrary to Plaintiff's assertions, the burden never shifted to the Secretary, but remained on the Plaintiff to prove his disability. If the Secretary's conclusion that Plaintiff can perform the work of a barber is supported by substantial evidence this Court is bound by that finding. Byron v. Heckler, 1232, 1234 (10th Cir. 1984).

This Court does find substantial evidence in the record to support the

Secretary`s findings, in spite of the fact that, as Plaintiff points out, a Plaintiff`s treating physician`s testimony must be accorded substantial weight. Byron v. Heckler, 742 F.2d at 1235. In this case the Appeals Council complied with the requirement of Byron that "{i}f the opinion of the claimant`s physician is to be disregarded, specific legitimate reasons for this action must be set forth." Id. (citation omitted). The Appeals Council`s opinion contains the following passage indicating its reasons for disregarding Dr. Rodriguez` opinion.

> There is a stark contrast present in the severity of the fingings reported by neurologist Bieganowski and orthopedist Boggiano with regard to the claimant`s musculoskeletal impairment. Dr. Rodriguez`s reports, covering the period from September 1980 through January 1983, consistently

mentions the presence of acute neck pain, severe muscle spasm and unspecified amounts of motion loss. Contrastingly {sic}, Dr. Boggiano, who is a Board-certified orthopedist, diagnosed multiple symptoms of functional origin and an asymptomatic cervical and lumbar spine. Dr. Boggiano's report details a very complete examination of the claimant, whereas Dr. Rodriguez's reports contain few clinical findings in support of the multiple diagnoses he has rendered. Dr. Bieganowski, who examined the claimant at Dr. Rodriguez's request on April 12, 1981, reported no significant motor, sensory, or reflexive abnormalities. He did note tenderness upon palpation of the claimant's cervical occipital region and some pain upon full extention of the claimant's neck, however, neither Dr. Bieganowski's nor Dr. Boggiano's reports detail an impairment nearly as severe as that described in the reports from Dr. Rodriguez.

X-ray examinations have shown the presence of moderate osteoarthritis in the claimant's cervical and

lumbosacral spine. Electromyographic and nerve conduction velocity studies have been negative. These studies corroborate more closely the findings of Dr. Boggiano than those of Dr. Rodriguez. Dr. Rodriguez has repeatedly stated that the claimant is permanently incapable of any work activity. Said opinion has not been lightly regarded by the Council and could be controlling in a given case. However, the weight to be accorded Dr. Rodriguez's opinion must be determined by the extent to which his opinion is supported by specific clinical and laboratory findings. In this case, Dr. Rodriguez's reports are not well documented with such findings. He describes an impairment which is much more severe than that indicated by laboratory studies and by other physician's of record. The Appeals Council believes that the opinion of Dr. Rodriguez is contraverted by evidence from other sources which is more persuasive as to the true ability of the claimant to perform work-related functions.

(R. 11-12)

This Court must not weigh the evidence, and can not substitute its discretion for that of the agency. Broadbent v. Harris, 698 F.2d 407, 414 (10th Cir. 1983); Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). The Appeals Council properly weighed the conflicting evidence, giving specific and legitimate reasons for not according controlling weight to Dr. Rodriguez' opinions, and its conclusion will not be disturbed by this Court.[8]

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[8]Plaintiff states in his argument that an independent, objective medical examination upon his hospitalization in 1982 showed that Plaintiff was in chronic distress, with marked limitation of motion. Plaintiff's Memorandum at 9, filed June 17, 1985. A review of the record at the page indicated by Plaintiff reveals that the examination report quoted by Plaintiff was completed by Dr. Rodriguez, Plaintiff's treating physician, not by an independent physician as asserted by Plaintiff.

Plaintiff contends that the Appeals Council erred by ignoring the physician's reports favorable to Plaintiff and Plaintiff's complaints of pain. Plaintiff also alleges error in the Appeals Council's rejection of the ALJ's findings that Plaintiff's complaints of pain are credible.

Plaintiff's contentions are not well taken. The ALJ did not specifically find that Plaintiff's complaints of pain were credible. The ALJ stated that Plaintiff's psychogenic pain disorder "is not of a severe nature and therefore it does not significantly affect his maximum sustained work capability." (R. 23.) The ALJ went on to find that Plaintiff is unable to perform sedentary work because of his physical condition only. (Id.) In light of these findings the Court does not agree

that the Appeals Council rejected the ALJ's findings that Plaintiff's complaints of pain were credible.

The Appeals Council did consider the physician's reports that were favorable to Plaintiff, as reflected in the passage quoted at pp. 9 and 10 of this Opinion, supra, and also considered Plaintiff's complaints of pain, as shown by the following passage.

> In concluding that the claimant has the residual capacity for light work activity, the Appeals Council does not wish to minimize the factor of pain and its effect on the claimant's ability to function. The claimant has consistently alleged disabling pain, yet on December 2, 1980, he told Dr. Boggiano that he prepares breakfast for his children, cuts their hair, works in his yard, drives his car and shops. He does jumping-jacks and walks several miles per day. These activities are not consistent with the claimant's allegation of disabling pain

> and would not be inconsistent with the Council's contention that the claimant retains the ability to perform light work activity. Some pain medication as detailed in Exhibit 27, has been prescribed by Dr. Rodriguez, however, the type and dosages and medications would not be expected to significantly interfere with the claimant's ability to perform work-related functions. Further, the claimant has not alleged any untoward side-effects from his medications. The report of Dr. Boggiano indicates that many of the claimant's complaints may be functional in nature. Dr. Curtis' report raises a distinct possibility that the claimant may be exaggerating his somatic complaints. In view of the foregoing, the Council has concluded that the claimant's pain does not significantly diminish his capacity to perform light work activity.

(R. 12-13.) These findings are supported by substantial evidence.

Plaintiff's last assertion of error is that the Secretary improperly applied

the "grids". The grids are medical vocational guidelines used by the Secretary to assist in the determination of social security claims. The guidelines are only used, however, if the Secretary determines that a claimant cannot perform his past relevant work. 20 C.F.R. Section 404.1420(a) & (e). The Secretary found that Plaintiff can perform his past relevant work as a barber, (R. 13.), and did not apply the grids to Plaintiff's claim. Plaintiff's contention that the Secretary improperly applied the grids is not well taken.

Based upon the record as a whole, the Court finds that the Secretary's decision is supported by substantial evidence, and will be affirmed.

UNITED STATES DISTRICT JUDGE

CERTIFICATE

I, RAY LEWIS FULLER, an attorney for Petitioners and a member of the Bar of the United States Supreme Court, do hereby certify that on this 19th day of November, 1986, I served a copy of the foregoing Petition, by mail, postage prepaid to the attorneys of record herein for all parties:

Solicitor General
Department of Justice
Washington, DC 20530

Karen J. Behner, Asst. Reg.
Counsel Office of the General
Counsel Dept. of Health & Human
Services
1200 Main Tower, Room 1330
Dallas, TX 75202

RAY LEWIS FULLER

CERTIFICATE

I, RAY LEWIS FULLER, an attorney for Petitioner and a member of the Bar of the United States Supreme Court, do hereby certify that on this 5th day of December, 1986, I served a copy of the foregoing supplemented Petition, by mail, postage prepaid to the attorneys of record herein for all parties:

Solicitor General
Department of Justice
Washington, DC 20530

Karen J. Behner, Asst. Reg. Counsel
Office of the General Counsel
Dept. of Health & Human Services
1200 Main Tower, Room 1330
Dallas, TX 75202

RAY LEWIS FULLER

No. 86-952

In the Supreme Court of the United States

OCTOBER TERM, 1986

DANIEL L. FIERRO, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
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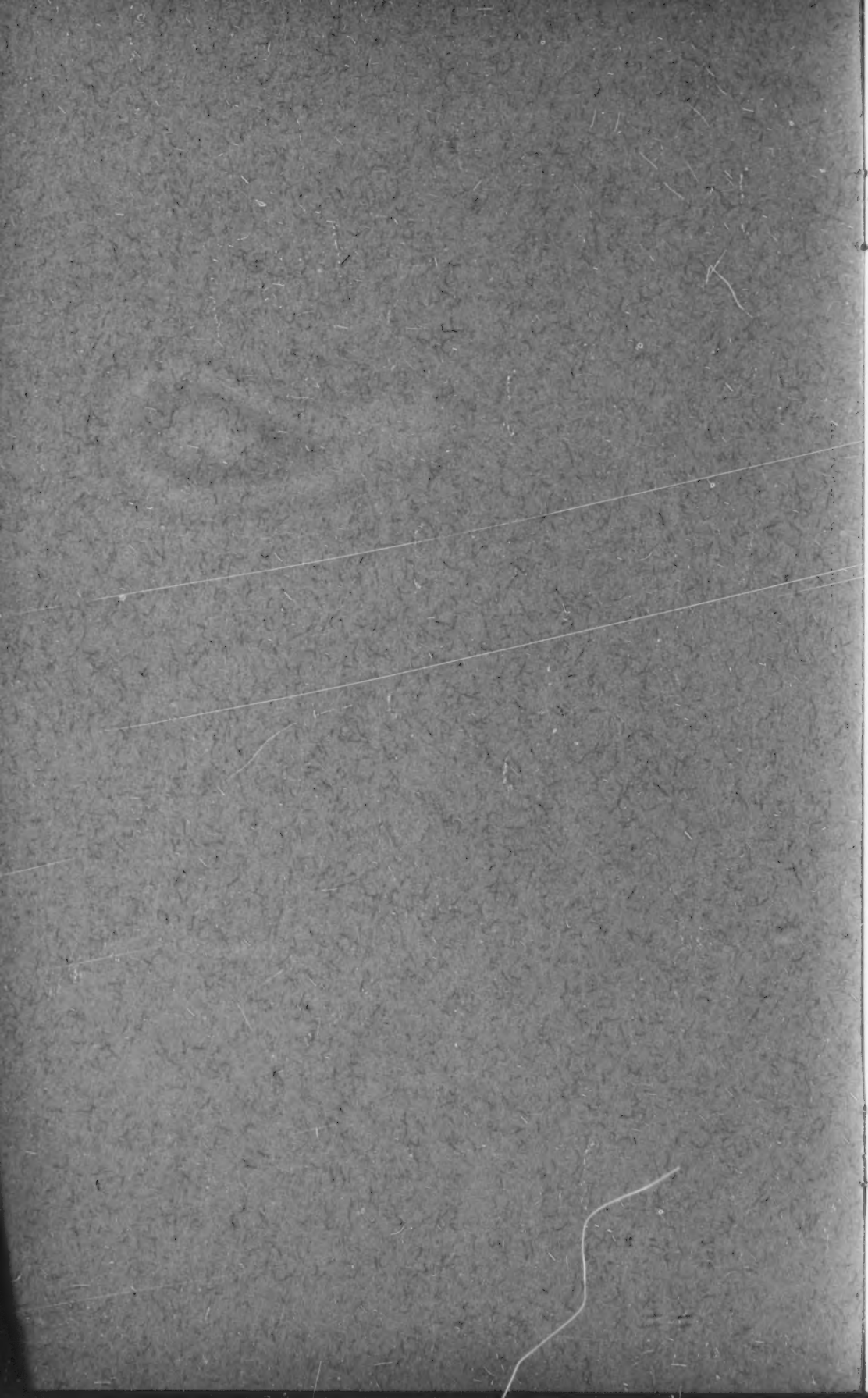

TABLE OF AUTHORITIES

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Social Security Administration Appeals Council lacked the authority to review on its own motion the decision of an administrative law judge awarding social security benefits to petitioner.

1. In October 1980, petitioner applied for disability and supplemental security income benefits under the Social Security Act. His claim was based on a neck injury sustained in an automobile accident and a previous injury to his left arm. Petitioner's application initially was denied; he then sought de novo review before an administrative law judge (ALJ), who granted the claim for benefits. The Appeals Council reviewed the case, vacated the ALJ's decision, and directed the ALJ to order psychiatric and psychological testing of petitioner. Pet. App. 3, 18.

The ALJ obtained this additional evidence and again found petitioner to be disabled. The Appeals Council decided to review the ALJ's decision, citing a regulation that directs the Appeals Council to exercise its review

authority where it believes that the ALJ's decision is "not supported by substantial evidence" (20 C.F.R. 404.970(a)(3)). The Appeals Council denied petitioner's application for benefits on the ground that petitioner was not disabled within the meaning of the Social Security Act. The Appeals Council's decision became the final decision of the Secretary pursuant to 20 C.F.R. 404.981 and 404.1481. See Pet. App. 3-4, 18-19.

Petitioner commenced this action for judicial review of the Secretary's decision in the United States District Court for the District of New Mexico. The district court upheld the Secretary's position. It concluded that substantial evidence supported the Appeals Council's determination that petitioner was not disabled (Pet. App. 17-40).

The court of appeals unanimously affirmed (Pet. App. 1-16). Petitioner contended that the threshold question on judicial review was whether *the ALJ's* decision was supported by substantial evidence, a contention based on the theory that the Appeals Council's jurisdiction to review the ALJ depended upon how that threshold question was answered. The court of appeals rejected this argument, concluding that the Appeals Council has "overriding power to review any decision of an ALJ" (*id.* at 11). The fact that the Appeals Council initially had assigned, as its reason for review, the possibility that the ALJ's decision was not supported by substantial evidence, did not in the Tenth Circuit's view mean that a reviewing court must "first examine the ALJ's decision and determine whether it is supported by substantial evidence" (*ibid.*). Concluding that "that task of the judiciary * * * is to review the decision of the Secretary and not that of the ALJ," the court proceeded to consider whether the Appeals Council's decision was supported by substantial evidence (*id.* at 13). It found that substantial evidence in fact supported the Appeals Council's determination that petitioner was not entitled to benefits (*id.* at 14-16).

2. Petitioner contends that the ALJ's decision was assertedly supported by substantial evidence and hence that the Appeals Council lacked authority to review that decision. The decision of the court of appeals rejecting petitioner's argument is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), authorizes judicial review of "any final decision of the Secretary." That Section further states that "[t]he findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive" (*ibid.*). And the relevant regulations make clear that where the Appeals Council issues a decision, that decision constitutes the final decision of the Secretary. See 20 C.F.R. 404.900, 404.981, 404.1400, 404.1481. The task of a reviewing court under Section 205(g), therefore, is to determine whether the Appeals Council's decision is supported by substantial evidence.

Petitioner's argument would invert this statutory scheme. He would require a reviewing court to apply the substantial evidence standard to the ALJ's decision on the ground that the jurisdiction of the Appeals Council turns upon whether the ALJ's decision is supported by substantial evidence. It is true that the Secretary has by regulation directed the Appeals Council to review four specified categories of ALJ decisions, including decisions in which "the action, findings or conclusions of the [ALJ] are not supported by substantial evidence" (20 C.F.R. 404.970(a)(3)). But a companion regulation states that "[a]nytime within 60 days after the date of the hearing decision or dismissal [by an ALJ], the Appeals Council itself may decide to review the action that was taken" (20 C.F.R. 404.969). Section 404.969 thus "authorizes the Appeals Council to review any ALJ decision under its own

motion review authority," and Section 404.970(a) "merely indicates the kinds of decisions the Appeals Council will review" (*Bauzo* v. *Bowen,* 803 F.2d 917, 921 (7th Cir. 1986)). As the court below noted, the Secretary's interpretation of his own regulations is "entitled to great deference" (Pet. App. 9). When the provisions of the two regulations are read together, it is clear that "the limited purpose of § 404.970(a) is to advise claimants of those kinds of cases in which the Appeals Council will exercise its power under § 404.969" (*Bauzo* v. *Bowen,* 803 F.2d at 921-922).

Indeed, every court of appeals that has addressed the issue has agreed with the court below that the Appeals Council has plenary authority to review the decision of an ALJ and that a reviewing court must apply the substantial evidence test to the decision of the Appeals Council, not to the decision of the ALJ. *Lopez-Cardona* v. *Secretary of Health & Human Services,* 747 F.2d 1081, 1082-1083 (1st Cir. 1984); *Welch* v. *Heckler,* 808 F.2d 264, 266-268 (3d Cir. 1986); *Kellough* v. *Heckler,* 785 F.2d 1147, 1149-1151 (4th Cir. 1986); *Deters* v. *Secretary of Health, Education & Welfare,* 789 F.2d 1181, 1184-1185 (5th Cir. 1986); *Mullen* v. *Bowen,* 800 F.2d 535, 539-546 (6th Cir. 1986) (en banc); *Bauzo* v. *Bowen,* 803 F.2d at 920-922; *Baker* v. *Heckler,* 730 F.2d 1147, 1149-1150 (8th Cir. 1984); *Taylor* v. *Heckler,* 765 F.2d 872, 874-875 (9th Cir. 1985); *Parker* v. *Bowen,* 788 F.2d 1512, 1516-1520 (11th Cir. 1986) (en banc).[1]

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[1] The mere fact that the Appeals Council cites the possible absence of substantial evidence as the factor triggering its decision to review an ALJ's determination does not mean that the Council's *jurisdiction* turns on the presence of substantial evidence. As one court has observed, "[t]he Council may believe * * * that the case fits [a category of mandatory review], but it may turn out, after full examination, that this initial impression was mistaken. We do not believe that the Council is then required to abandon its own review and to allow the ALJ's

Petitioner's claim that there is a conflict among the courts of appeals with respect to the question presented here (Pet. 7-9) rests entirely upon cases that have been overruled. Thus, petitioner relies (Pet. 8, 23) upon *Newsome* v. *Secretary of Health & Human Services,* 753 F.2d 44 (6th Cir. 1985), but that decision was overruled by the en banc Sixth Circuit in *Mullen* v. *Bowen,* 800 F.2d at 542. Petitioner cites (Pet. 8, 23) *Scott* v. *Heckler,* 768 F.2d 172 (7th Cir. 1985), but that decision was overruled by the Seventh Circuit in *Bauzo* v. *Bowen,* 803 F.2d at 919 n.*, 921. And petitioner invokes (Pet. 15) some language in *Parris* v. *Heckler,* 733 F.2d 324 (4th Cir. 1984), but petitioner's interpretation of that passage from *Parris* was rejected by the Fourth Circuit in *Kellough* v. *Heckler,* 785 F.2d at 1149-1150. All of the courts of appeals are thus in agreement with the rule applied by the court below in the present case, and there is no warrant for review by this Court.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1987

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decision to stand, even when it has a definite and firm conviction that the ALJ was mistaken." *Baker* v. *Heckler,* 730 F.2d at 1150; see also *Welch* v. *Heckler,* 808 F.2d at 267 n.2.

[2] Petitioner refers (Pet. 9) to the petition for a writ of certiorari in *Escalante* v. *Bowen,* No. 85-1726, but that petition was dismissed on July 22, 1986, pursuant to Rule 53 of the Rules of this Court. Petitioner also cites several district court decisions (Pet. 8), but those decisions do not create a conflict warranting review by this Court. Moreover, those cases all arose in circuits that have since adopted a rule identical to the one adopted by the court below.

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